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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/608,582	06/23/2003	Haim B. Gunner	07880-121001 / UMA00-16A	8442
26191	7590	03/24/2004	EXAMINER	
WARE, DEBORAH K				
FISH & RICHARDSON P.C. 3300 DAIN RAUSCHER PLAZA 60 SOUTH SIXTH STREET MINNEAPOLIS, MN 55402			ART UNIT	
			PAPER NUMBER	
			1651	

DATE MAILED: 03/24/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/608,582

Applicant(s)

GUNNER ET AL.

Examiner

Deborah K. Ware

Art Unit

1651

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
  - If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
  - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
  - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_.

### **DETAILED ACTION**

Claims 1-20 are presented for examination on the merits.

#### ***Miscellaneous Papers***

The miscellaneous papers have been received.

#### ***Information Disclosure Statement (IDS)***

The references submitted on the IDS have been considered.

#### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-2 are rejected under 35 U.S.C. 102(b) as being anticipated by Schisler et al (US Pat '940) cited on enclosed PTO-1449 Form.

Claims are drawn to a composition comprising 10(3) to about 10(11) CFU. The strain exhibits fungicidal activity towards fungal plant pathogens such as Rhizoctonia species or Pythium species. The strain is ATCC PTA 4838. Also a method is claimed.

Schisler et al teach identical subject matter, note col. 5, lines 15-46. Further, Fusarium species is taught at col. 5, line 60, also note col. 5, lines 15-46 and col. 8, lines 57-60.

The claims are identical to the disclosure of Schisler and are therefore considered to be anticipated by the teachings therein.

Claims 1-2 are rejected under 35 U.S.C. 102(b) as being anticipated by Cook et al (US Pat No. -689), cited on enclosed PTO-1449 Form.

Claims are discussed above. However, additional claims 9 and 10 further describe Rhizoctonia and Pythium species.

Cook et al teach the same, note the abstract, and figure 3B; also note col. 1, lines 10-25, col. 5, line 35 and lines 65-66, col. 6 and col. 23, lines 54-67, and entire document.

The claims are identical to the cited disclosure and are therefore, considered to be anticipated by the teachings therein.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later

invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 3-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schisler et al. or Cook et al, both in view of Backman et al, Ito et al. and Allen Jr. et al.

Claims are further drawn to compositions and methods wherein the composition comprises specific bacterial strain and carrier. The carrier comprises porous, ceramic particles having a pore size of from about 0.5  $\mu\text{m}$  to about 5 $\mu\text{m}$ . The composition comprises weight percents of growth medium per carrier on a wt/wt dry basis. The fungal pathogen can be *Candida* species, etc. and various others. Further, the composition is applied to contaminants.

Ito et al teach a carrier selected from porous ceramics for use with microbes, note col. 5, lines 45-67 and note line 66. Further the microbe is placed in growth medium, note col. 7, lines 60-65 and col. 8, lines 60-67.

Backman et al teach fungal pathogens selected from *Alternaria* and/or *Sclerotinia* species and *Fusarium* and *Rhizoctonia*, note col. 3, lines 33, 47-48 and 59. They are controllable in the soil using the compositions..

Allen Jr. teach a creeping bentgrass contaminated with crabgrass and which can be treated with an agent to remedy the contamination, see col. 1, lines 1-13 and col. 2, lines 15-25 and 34-37.

The claims differ from Cook and Schisler because the carrier is not disclosed nor are some of the other claim features.

It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to combine the teachings of Schisler and Cook with Ito, Backman and Allen

to be useful for delivering microorganisms to an environment for elimination of contaminants. It clearly teaches the carrier and to vary the amount of growth medium is within the purview of an artisan. The fungal pathogens are taught by the cited art. Therefore, to select for these contaminants is an obvious modification of the cited prior art. Backman teaches the compositions can be modified and applied to leaves and other mediums to remedy contaminants. To select for toxins such as toxaphen, etc. is well within the purview of an artisan. Also the contacting step and measuring of growth to test for inhibitory effects is an obvious modification of the prior art. The claims are obvious over the cited prior art.

All claims fail to be patentably distinguishable over the state of the art discussed above and cited on the enclosed PTO-892 and/or PTO-1449. Therefore, the claims are properly rejected.

The remaining references listed on the enclosed PTO-892 and/or PTO-1449 are cited to further show the state of the art.


No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Deborah K. Ware whose telephone number is 571-272-0924. The examiner can normally be reached on 9:30-6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mike Wityshyn can be reached on 571-272-0926. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
**DEBORAH K. WARE**  
**PATENT EXAMINER**

Deborah K. Ware  
March 20, 2004